WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
April 2006

This calendar contains cases that originated in the following counties:

Kenosha
Milwaukee
Racine
Richland
Waukesha
Winnebago

TUESDAY, APRIL 4, 2006

9:45 a.m.	04AP914-CR	State v. Larry A. Tiepelman
10:45 a.m.	04AP2010-CR	State v. Lionel N. Anderson
1:30 p.m.	04AP3384	Bernice Spiegelberg v. State

WEDNESDAY, APRIL 5, 2006

9:45 a.m.	04AP2592	Robert W. Bartholomew v. Wis. Patients Comp. Fund
10:45 a.m.	04AP2936-CR	State v. Brian Hibl

THURSDAY, APRIL 6, 2006

9:45 a.m.	03AP3348-D & 04AP2633-D	Office of Lawyer Regulation v. Michael D. Mandelman
10:45 a.m.	04AP2004	Russell S. Borst v. Allstate Insurance Company

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. These summaries are not complete analyses of the many issues that each case presents. They are a service of the Director of State Courts Office/Amanda Todd, Court Information Officer 608-264-6256.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 4, 2006
9:45 A.M.

04AP914-CR State v. Larry A. Tiepelman

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a judgment of the Richland County Circuit Court, Judge Edward E. Leineweber presiding.

This case involves a defendant who maintains that his constitutional right to due process was violated when a judge recited inaccurate information about the man's criminal history at sentencing. The Supreme Court is expected to determine whether to grant a request for a resentencing.

Here is the background: In 1996, Larry A. Tiepelman was convicted of theft by false representation as a repeat offense. A prison sentence was withheld and he was placed on 16 years' probation. Six years into the probation term, he committed a violation, was revoked, and was sentenced to 12 years' imprisonment. The judge's comments prior to issuing the sentence are at issue in this case.

In discussing Tiepelman's character and past offenses, the judge referred to a history of assault, noting "convictions" on several offenses related to domestic abuse. The judge also observed as follows:

> Mr. Tiepelman, at the time of the commission of this offense, had a long pattern of similar offenses…. I counted something over 20 prior convictions….

The judge who handled the original sentencing heard the motion for resentencing, and acknowledged that his tally of Tiepelman's prior convictions was in error, but concluded that the issue of the number of convictions was immaterial because he had considered, in crafting the sentence, Tiepelman's character and his pattern of criminal behavior rather than the number of convictions. At that hearing, Tiepelman's defense attorney conceded that the descriptions of Tiepelman's conduct had been accurate.

Tiepelman appealed, and the Court of Appeals affirmed the sentence. The Court of Appeals found that the trial court had not based its sentence upon the tally of convictions, but rather upon the total picture.

The primary issue before the Supreme Court in this case is whether, in order to obtain a new sentencing hearing, a defendant must prove that the sentencing judge actually relied on or considered inaccurate information. Tiepelman also asks the Supreme Court to determine whether, for purposes of assessing a defendant's character at sentencing, there is a difference between prior charges that were dismissed as part of a plea agreement and prior criminal convictions.

In a past similar case in which a defendant's arrests were confused with convictions, the Supreme Court held that this did not matter as long as the judge did not specifically rely upon the number of convictions in imposing the sentence. The Supreme Court noted that arrests and convictions may be considered "warning signs" by a sentencing court. Now, the

Supreme Court will look at this issue in a slightly different context and will determine whether Tiepelman deserves a new sentencing hearing.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 4, 2006
10:45 A.M.

04AP2010-CR State v. Lionel N. Anderson

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a judgment of the Milwaukee County Circuit Court, Judge Richard J. Sankovitz presiding.

This case involves a man who was convicted of sexually assaulting a child and is seeking a new trial based upon alleged communication problems between the trial court and the jury during deliberations.

Here is the background: Lionel N. Anderson was arrested for sexual assault after he forced a nine-year-old girl who was living in his home to perform oral sex on him.A jury trial was held. During deliberation, the jury asked several questions. First, it wanted to review the videotape in which the girl described the assault in detail. The judge allowed this. Then, it asked to have the testimony of both Anderson and the victim read back. The judge responded by asking the jury to narrow the request to specific sections of the transcript. The jury did not answer this request and reached a verdict without further communication with the judge.

Anderson was convicted and sentenced to 12 years' initial confinement followed by six years' extended supervision. He filed a post-conviction motion, which was denied, and then filed an appeal alleging that his constitutional right to a fair trail was violated when the judge allowed the jury to re-watch the videotape but denied the request to re-hear his testimony.

The Court of Appeals affirmed the conviction, although it expressed concern that the trial judge had communicated directly with the jury without seeking input from the parties. The majority concluded that Anderson had suffered no prejudice as a result of the trial court's communications with the jury because the State had a strong case, the defendant had a weak case, and the defendant's testimony – had it been read back – likely would have done him more harm than good.

Now, Anderson has come to the Supreme Court, where he argues that the trial court's communications with jurors violated his constitutional rights. The Court will decide whether Anderson will receive a new trial.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 4, 2006
1:30 P.M.

04AP3384 Bernice Spiegelberg v. State

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Winnebago County Circuit Court, Judge Robert Hawley presiding.

This case involves several parcels of land that were condemned for road building. The question before the Supreme Court is whether these parcels are to be valued individually, as the property owner argues is appropriate, or as a single unit, as the Department of Transportation (DOT) maintains is proper.

Here is the background: Bernice Spiegelberg owns just over 150 acres of agricultural land divided into five separately taxed parcels. They are contiguous except where two roads cut through.

The DOT sought to acquire an 11-acre swath that cut across three of the five parcels. For valuation purposes, the DOT analyzed the total land value both before and after the taking and came up with a difference of $18,900, which represented the value of the property taken by the State. The DOT analysis treated the five parcels as one. Spiegelberg countered with her own analysis, arriving at a price of $84,200. She treated each of the parcels as a separate piece of property with a separate value.

The case went to court and Spiegelberg won a judgment for $84,200. The DOT appealed, and the Court of Appeals, as noted, certified this case to the Supreme Court after concluding that the question of whether to value the property in this case as one unit (the "unit rule") or as five separate parcels has never previously been decided in the state in similar circumstances.

In the Supreme Court, the DOT argues that Spiegelberg's land was used as one unit – for a farm – and therefore is appropriately valued as one unit. Spiegelberg, on the other hand, points out that the property was already legally divided before the condemnation and likens it to a completed subdivision, where each individual plot could be sold off separately.

The Supreme Court will clarify how land is to be valued for purposes of condemnation, in circumstances where there are multiple, contiguous plots used as part of a single economic enterprise.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 5, 2006
9:45 A.M.

04AP2592 Robert W. Bartholomew v. Wisconsin Patients Compensation Fund

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a judgment of the Kenosha County Circuit Court, Judge Wilbur W. Warren presiding.

This case involves a claim for wrongful death resulting from medical malpractice. The Supreme Court, which overturned caps on medical malpractice awards for non-economic damages last year, is expected to decide if a deceased woman's estate may recover damages for her pre-death pain and suffering on top of the wrongful death damages that her husband collected for the loss of society and companionship of his wife.

In 1995, the Legislature enacted a $350,000 cap on non-economic damages in medical malpractice cases. While the Supreme Court upheld the constitutionality of a cap in medical malpractice cases that result in wrongful death,[1] it subsequently found the cap unconstitutional when applied to a patient who survived.[2]

This case involves a plaintiff who lived for several years after the alleged malpractice but then died. The question is whether her estate and her husband are entitled to collect non-economic damages for the five years of ill health prior to her death, in addition to the loss of companionship after her death. Her lawyers argue:

> It is … blatantly unconstitutional to now hold that the most seriously injured victims – those who ultimately die – are still held to a cap for their pre-death non-economic claims.

Here is the background: On Dec. 21, 1998, Helen Bartholomew had pain in her chest and left shoulder and arm. She sought care at a walk-in clinic and was examined by a physician who misdiagnosed the problem. The next day, she suffered a heart attack. After a hospital stay, she was in a nursing home until her death in October 2003.

Robert Bartholomew sued Prakash Shah, M.D., and the Wisconsin Patients Compensation Fund. A jury awarded damages of $500,000 to the estate for pre-death pain and suffering, $350,000 to Robert for the loss of his wife's society and companionship (pre-death) and another $350,000 for the loss of society and companionship after her death.

Soon after, the Supreme Court issued the Maurin decision that said awards for medical malpractice and wrongful death may not be stacked; plaintiffs may collect for one or the other. As a result, the trial court cut the Bartholomew verdict to $350,000.

Robert appealed, and the Court of Appeals affirmed. Now, Robert has come to the Supreme Court, which will revisit the decision to cut the damages awarded by the jury. The Wisconsin Academy of Trial Lawyers has filed an amicus brief in this case, arguing that the Court should use this case to overturn Maurin.

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[1] Maurin v. Hall, 2004 WI 100.
[2] Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 2005 WI 125

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 5, 2006
10:45 A.M.

04AP2936-CR State v. Brian Hibl

This is a review of a split decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Waukesha County Circuit Court, Judge Paul F. Reilly presiding.

This is a so-called "accidental confrontation" case involving an encounter that occurred by chance rather than as a part of a police investigation. The Supreme Court is expected to clarify the admissibility of this type of eyewitness identification.

In 2005, the Court handled a criminal appeal that raised an issue of the reliability of eyewitness identification in police show-ups. In a show-up, a witness is shown one person rather than a line of possible suspects or a photo array. The majority in that case held that show-ups are permissible under certain limited circumstances but in general should be avoided in favor of investigative tools that are less prone to error:

> The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined.

The Court will, in this case, determine whether its 2005 decision controls the admissibility of eyewitness identifications resulting from accidental confrontations.

Here is the background: In June 2002, a Muskego police officer noticed a red pickup truck and a white van speeding on Racine Avenue. He watched the vehicles jockey for position and then saw the pickup crash and the white van continue without stopping. A witness, Alan Stuller, gave a statement to police in which he provided the only identifying information he said he could recall: that the van driver was a white male.

Two days later, a man called police to report that his employee, Brian Hibl, had reported witnessing the accident. Hibl talked to police and ended up admitting that he was the driver of the white van. He was charged with one count of causing great bodily harm by reckless driving and two counts of causing bodily harm by reckless driving.

Stuller was subpoenaed as a trial witness. When he arrived at the courthouse, he saw Hibl in the hall and identified him as the driver before the trial began. Stuller then took the stand and identified him in court.

Hibl asked for and received a mistrial, and then filed a motion to suppress the identifications made by Stuller. The court granted this motion after concluding that the hallway identification, made 15 months after the crash, was not reliable given his lack of ability on the day of the incident to describe Hibl.

The State appealed, arguing that unplanned encounters should not be subject to the same reliability test as encounters arranged by police. The Court of Appeals affirmed. Judge Richard Brown, dissenting, expressed concern that spontaneous identifications – which occur frequently – will now be much more difficult to admit into evidence.

The Supreme Court will clarify how the reliability of spontaneous, out-of-court identifications is to be weighed.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 6, 2006
9:45 A.M.

03AP3348-D/04AP2633-D Office of Lawyer Regulation v. Michael D. Mandelman

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

These two cases involve Milwaukee Atty. Michael D. Mandelman, who has been licensed to practice in Wisconsin since 1980, and who has previously been disciplined for misconduct. The first case results from a December 2003 complaint by the Office of Lawyer Regulation (OLR) that alleges misconduct in representation of five clients. The second case stems from an October 2004 OLR complaint that alleges failure to file income tax returns, filing untimely tax returns, and failing to pay income taxes when due.

Mandelman has a history of professional misconduct. In 1990, the Supreme Court suspended him for one year after finding that he had committed 27 violations of attorney ethics rules. In 1994, when Mandelman's first suspension ended, the Court declined to reinstate his license and instead suspended him for another 18 months for committing additional misconduct.

In this current case, the referee found that Mandelman committed nine counts of misconduct and recommended a nine-month license suspension. OLR had filed 13 counts against Mandelman and seeks a one-year suspension. Mandelman is appealing on all of those counts, and OLR is cross-appealing. The five cases that sparked these misconduct charges involve:

1. A woman who sought Mandelman's help in suing her past attorney and in regaining custody of her child;
2. A man who was seriously injured when a pickup truck forced his motorcycle off the road;
3. A man who was seriously injured when he was forced to leap from his motorcycle at a stop light to avoid being run over by a truck that was backing up;
4. A woman who sought to file a sexual harassment claim against her former employer; and
5. A woman who was injured in a five-car collision on I-94.

In these cases, OLR alleges, Mandelman failed to act in a timely manner at various critical junctures and failed to communicate with his clients. Mandelman (who admits the income-tax-related problems alleged in the second case) maintains that the lack of diligence allegedly displayed in these five cases was the fault of Atty. Jeffrey A. Reitz, with whom Mandelman worked and whose license the Supreme Court suspended for five months in 2005.

The Supreme Court will decide what discipline to impose on Mandelman.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 6, 2006
10:45 A.M.

04AP2004 Russell S. Borst v. Allstate Insurance Company

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Racine County Circuit Court, Judge Michael Fisher presiding.

This case involves an arbitrator who allegedly demonstrated "evident partiality" in a dispute between an individual and the individual's insurance company. The Supreme Court is expected to decide whether "evident partiality" may be avoided by full disclosure by the arbitrator of his/her relationship with one of the parties along with a declaration by the arbitrator that s/he can be impartial. The Court also is expected to weigh whether there is a presumption of impartiality among arbitrators that may be sidestepped by explicit agreement of all parties. Finally, it will develop clearer standards for defining the role of arbitrators and the extent of their authority.

Here is the background: Russell Borst had a collision with an uninsured driver. He hired a lawyer to resolve a coverage dispute between himself and his insurer, Allstate Insurance Co.

The parties agreed to settle their differences in arbitration, and Allstate named Rick Hill as its arbitrator. Borst's attorney, however, knew that Hill's law firm represented Allstate and its policyholders and challenged the choice of Hill as arbitrator. Hill acknowledged the relationship, but assured Borst that he would be impartial.

The discovery phase of the case began. The purpose of discovery is generally to provide parties with knowledge of facts relevant to a case before a trial so that the trial is limited to resolving areas of dispute. Borst objected to Allstate's discovery requests, which included requests for medical information, and specifically refused to submit to a deposition (in which Allstate's attorneys would ask him questions under oath). Allstate responded by obtaining an order from the arbitration panel that required Borst to comply, and Borst responded to this order by informing the panel, in writing, that he would not comply and by expressing concerns about the arbitrator's relationship with Allstate.

Then, without waiving its right to depose Borst, Allstate decided to depose the uninsured motorist. Borst sued, and the court stopped the proceedings and sent the case back to the arbitration panel for resolution. The panel valued Borst's claim at $3531 but found him 50 percent negligent and awarded him $1,765. The circuit court confirmed the award and Borst appealed, making arguments about the evident partiality of the arbitrator and questioning the scope of discovery in the arbitration process.

The Court of Appeals, noting that arbitration is used with increasing frequency in Wisconsin and that there are uncertainties in the language of the statutes and in the case law governing arbitration, certified this case to the Supreme Court.

The Supreme Court will attempt to clarify arbitration procedures and address how an arbitrator's evident partiality may be addressed.